Supreme Court, U.S.
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No. 01-815

In The

Supreme Court of the United States

MARY C. OVERBY and
JAMES OVERBY,

Petitioners,

v.

BENJAMIN G. WITSO,

Respondent.

On Petition For Writ Of Certiorari To The Minnesota Supreme Court

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF FACTS

In its decision filed June 7, 2001, the Minnesota Supreme Court affirmed the district court's and the court of appeals' determination that under Minnesota's version of the Uniform Parentage Act, respondent has standing to commence a paternity action and to request genetic paternity testing. Petitioners now ask this Court to review this decision, asserting that the court below failed to consider due process and equal protection issues.

By order dated August 27, 1999, the Hennepin County District Court determined that respondent had standing to initiate a paternity action and to request an order for genetic paternity testing to determine whether he is a presumed father under the Minnesota Parentage Act. Thereafter, petitioners requested that the district court certify the following question to the Minnesota Court of Appeals: "whether [respondent] has standing to compel blood or genetic testing."

In response to petitioners' request, the district court certified the following question as important and doubtful:

> When the biological mother admits having had intercourse with the putative father during the period of possible conception of the child at issue, the putative father acts promptly to compel blood or genetic testing, and the child is yet so young that she will not be cognizant of the testing procedure, does the putative father have standing to compel the mother and child to submit to the tests (keeping in mind that the trial court has reserved jurisdiction to appoint a guardian ad litem depending on the test results and then determine whether it is in the child's best interests that the litigation continue)?

In its decision affirming the district court's order for blood testing, the Minnesota Court of Appeals recast the certified question as follows:

> Must a paternity action be dismissed for lack of standing when the petitioning putative father shows the requisite sexual contact but has not had genetic testing, which might establish the genetic basis for standing that arises from a positive genetic test?

In sum, the *only* issue petitioners requested and had certified for appeal in the Minnesota courts, and the *only* issue that two Minnesota appellate courts considered and decided was this: whether respondent had standing to bring a paternity action and request an order for genetic testing. The certified question requested by the appellants on appeal from the district court's order compelling paternity blood testing dealt *solely* with respondent's standing to commence a paternity action and as a party thereto request an order for genetic testing. Until now, petitioners have not advanced a due process, equal protection, or other constitutional argument to any of the courts that have examined the issue of standing.

REASONS FOR DENYING THE WRIT

There is no compelling reason for the Court to review the Minnesota Supreme Court's decision in this case. The only arguable federal question presented by the Petition – whether the petitioners' and the minor child's due process and equal protection rights have been violated – has not previously been pressed by petitioners or passed on by any of the courts below. No substantial federal question is present here, and the issues presented are not ones of nationwide impact.

I. THE COURT SHOULD DENY THE WRIT BECAUSE THE QUESTIONS PETITIONERS PRESENT TO THE COURT ARE NOT FEDERAL QUESTIONS.

The first two questions presented in the petition raise purely state law issues. The first question, "Whether a man holding no presumption of paternity [under a state

paternity statute] can gain standing to compel the minor child to undergo blood or genetic testing to determine whether he is a presumed father of the minor child" raises no federal issue, and no federal statute or caselaw is offered in the petition to support an argument that a federal question is presented.

Likewise, the second question, "Whether a state can order blood or genetic testing of a minor child who is part of an intact family without first determining if such tests would be in the minor child's best interests," does not call into question any federal issue.

Petitioners' third question *purports* to raise federal constitutional issues of equal protection and due process rights, but the question points to no conflict among lower courts or to any conflict with a decision of this Court.

In their argument, Petitioners assert that the Minnesota Supreme Court's decision conflicts with decisions from other states in which a version of the Uniform Parentage Act has been enacted. However, it is distinctly within the realm of a state court to interpret its own statutes, and the states which have enacted a Parentage Act have adopted varying versions with differing language. No decision of this Court compels a state court to follow another state's caselaw when interpreting its own unique statute.

Petitioners' only citation to a decision of this Court is to the plurality opinion in *Michael H. v. Gerald D.*, 491 U.S. 110, 109 S.Ct. 2333, 105 L.Ed.2d 91 (1989). The *Michael H.* case involved a constitutional challenge to a California paternity statute which provided that "the issue of a wife cohabiting with her husband, who is not impotent or sterile, is *conclusively presumed* to be a child of the marriage." 491 U.S. at 115, 109 S.Ct. at 2338 (emphasis added). In that case, the man claiming to be the biological father of a child born to a married woman challenged the constitutionality of that statute, claiming he had a liberty interest in establishing and maintaining a relationship

with his biological child that was entitled to constitutional protection.

The Minnesota legislature has not chosen to grant the marital presumption of paternity the conclusive effect that the California statute at issue in *Michael H.* provided, and as interpreted by the Minnesota Supreme Court, no Minnesota statute prohibits respondent from initiating a paternity proceeding and requesting blood tests. The *Michael H.* decision merely considered whether the California court had constitutionally interpreted and applied its own statutes. Because no similar Minnesota statute exists, because the *Michael H.* opinion was issued in the context of a challenge based on the biological father's due process rights, and because petitioners have not heretofore asserted their own due process rights, the *Michael H.* opinion carries no precedential weight in the instant matter. The Minnesota Supreme Court's decision only holds that the Minnesota Parentage Act bestows standing on respondent to commence a paternity action and request blood tests. That decision is not in conflict with *Michael H.*, and petitioners have failed to present any federal question requiring resolution by this Court.

II. PETITIONERS HAVE NEVER PRESSED, AND THE COURTS BELOW HAVE NOT PASSED ON, ANY FEDERAL CONSTITUTIONAL ISSUE.

Petitioners did not assert or brief an affirmative due process or equal protection argument to the trial court, to the Minnesota Court of Appeals or to the Minnesota Supreme Court. Where no federal constitutional issue was pressed or passed on by the state court, this Court should decline to hear the case. *See Illinois v. Gates*, 462 U.S. 213, 103 S.Ct. 2317, L.Ed.2d 527 (1983).

Petitioners did not raise any affirmative due process, equal protection, or other constitutional arguments in their submissions to the district court or to the state appellate courts. To the extent that petitioners argued any

constitutional issues at all. Their arguments consisted of responses against constitutional issues they anticipated respondent might make on his own behalf (and which he did not, in fact, raise). Petitioners did not brief any affirmative constitutional arguments and did not argue any constitutional issues at oral argument before the Minnesota Supreme Court. There has been no real contest at any stage of this proceeding upon the point. The Minnesota Supreme Court's decision does not discuss the merits of any constitutional issue. The decision is merely a state court's interpretation of whether respondent has standing to commence a proceeding under a state paternity statute.

"Due regard for the appropriate relationship of this Court to state courts requires us to decline to consider and decide questions affecting the validity of state statutes not urged or considered there." *Id. (quoting McGoldrick v. Compangnie Generale*, 309 U.S. 430, 435-436, 60 S.Ct. 670, 673, 84 L.Ed. 849 (1940)).

CONCLUSION

For the foregoing reasons, respondent respectfully requests that this Honorable Court deny the Petition.

Respectfully submitted,

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